IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 653

ATLAS MILLING COMPANY, a Corporation, *Petitioner*,

v.

HENRY C. JONES, Collector of Internal Revenue, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Atlas Milling Company, an Oklahoma corporation, as petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered October 14, 1940, in the above entitled proceeding, docketed in said court as No. 2053.

Opinions.

The opinion of the District Court appears in 29 Fed. Supp. 942, and at page 42 of the Record. The first opinion of the Circuit Court of Appeals appears at page 53 of the Record. Motion for rehearing was granted and the second opinion after rehearing appears at page 58 of the Record. The opinions are reported in 115 Fed. (2) 61, 64.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Tenth Circuit, affirming the judgment of the District Court, was entered on October 14, 1940. The jurisdiction of this court is invoked under the provisions of Section 347 (a), Title 28, U. S. C. A.

Question Presented.

Whether the petitioner may deduct from its gross income for the year 1933 an allowance for depletion upon a percentage basis.

(a) Whether the petitioner had such an economic interest in the property as to entitle it to claim depletion.

(b) Whether its operations were such as to bring it within the terms of the applicable statutes and regulations.

Statute Involved.

The statutes involved are Section 23 (l), 23 (m), and 114 (b) (4) of the Revenue Act of 1932, 47 Stat. L. 169, which are set forth in full in the appendix.

Regulations.

The regulation involved is Article 221 of Regulations 77, promulgated under the Revenue Act of 1932, which is set forth in full in the appendix.

Statement.

This is an action to recover income and excess profits taxes paid by petitioner for the year 1933, based on a deficiency assessment resulting from disallowance of petitioner's claim for percentage depletion upon its operations for that year.

Petitioner, an Oklahoma corporation, in July, 1933, acquired a lease on a 40-acre tract of land in Ottawa County, Oklahoma, giving it the exclusive right to enter upon the land for the purpose of re-running and re-treating all mine tailings thereon, approximately three-fourths million tons, and to extract and sell the zinc concentrates recovered therefrom upon a royalty basis. The petitioner under its lease did not have the right to do underground mining, but the mine upon said land was in no sense worked out or abandoned for underground mining operations were carried on simultaneously with petitioner's operations by other lessees.

Petitioner entered upon the land, loosened the mine tailings by blasting and digging, transported the same approximately three-fourths of a mile to its concentrating mill, where it subjected the tailings to further crushing and milling, recovering zinc concentrates by means of gravity concentration and flotation. These concentrates had never before been captured or reduced to possession and had never before been in any form in which they could be marketed.

The tailings which were re-run and re-treated by petitioner were deposited on the land by a prior mining lessee during the years 1917 to 1925. This prior lessee engaged in underground mining, hoisting the ore-bearing dirt or rock to the surface where it was crushed and milled, and the zinc concentrates which were freed by that operation were sold. There remained, however, in the crushed rock or tailings which were deposited on the surface of the land after the first milling by the prior lessee, fine grains of zinc which were embedded in the particles of crushed rock, in the same condition as existed before the rock had been re-

moved from the underground, except that the rock particles had been reduced in size by reason of the crushing in the plant of such prior lessee. These tailings were known at that time to contain valuable minerals and were preserved for that reason. There was no method in use during those years in which the tailings were deposited on the land by the prior lessee, by means of which such mineral values could be extracted from the tailings and captured, but a process known as oil flotation was then in the experimental stage and was familiar to the mining fraternity. Subsequently this flotation process was perfected and put into commercial use.

Such flotation process was used by petitioner. In order to liberate and capture the fine grains of zinc contained in the tailings, petitioner again crushed the rock particles to smaller size and subjected them to further gravity concentration and to the flotation process which separated the mineral values from the residue. The testimony in the case shows that the ore-bearing dirt when brought to the mouth of the shaft is not marketable but must be subjected to milling in order to separate the zinc concentrate which is a marketable product, and that the tailings were not marketable but they too must be subjected to the milling process in order to separate the zinc concentrate.

From its operations petitioner realized a net income against which it made a claim for a deduction for percentage depletion. The Commissioner of Internal Revenue disallowed the claim for such deduction and made a deficiency assessment and demand, and payment under protest followed. Claim for refund was made, disallowed, and suit instituted in the District Court which sustained the deficiency assessment and rendered judgment for the defendant Collector, which judgment was affirmed by the Circuit Court of Appeals for the Tenth Circuit.

Specifications of Error.

The United States Circuit Court of Appeals for the Tenth Circuit erred:

1. In holding that the operations of the petitioner were in the nature of manufacturing or processing operations and were not within the purview of Sections 23(l), 23(m), and 114(b)(4) of the Revenue Act of 1932, 47 Stat. L. 169.

2. In holding that petitioner did not have an "economic interest" in the property from which the income was derived.

Reasons Relied Upon for the Granting of the Writ.

I.

The Circuit Court of Appeals has in this case decided that the depletion allowance authorized under Sections 23(l), 23(m) and 114(b)(4) of the Revenue Act of 1932, 47 Stat. L. 169, does not apply to income derived in payment for zinc minerals extracted from mine tailings deposited on the surface of a property devoted to mining purposes.

II.

The decision of the Circuit Court of Appeals rests upon a method of statutory construction manifestly in conflict with applicable decisions of this Court.

III.

The Circuit Court of Appeals has decided an important question of federal law of general importance, which has not been and should be authoritatively decided by this Court.

IV.

This petitioner, together with many other operators similarly engaged throughout the United States, are by the decision of the Circuit Court of Appeals in this case deprived of the right to percentage depletion, although they are engaged in producing valuable mineral concentrates which are primary in character and which have not theretofore been captured or reduced to possession, and which constitute a part of the mineral reserve of the property from which they are taken.

V.

The Circuit Court of Appeals has decided that petitioner has no economic interest in the mining property from which it produced zinc concentrates, notwithstanding its lease gave it exclusive possession of the deposits on the surface and the right to re-run and re-treat the same and the use of so much of the surface as was required by its operations, and full control over the methods and means of production.

WHEREFORE, (and for the reasons set out in the brief in support hereof) petitioner prays that a Writ of Certiorari issue; and that, upon hearing, the decision below be reversed.

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PETITIONER'S

BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. .....

ATLAS MILLING COMPANY, A Corporation, *Petitioner*,

v.

HENRY C. JONES, COLLECTOR OF INTERNAL REVENUE, *Respondent*.

BRIEF IN SUPPORT OF PETITION.

The Allowance for Depletion Applies to All Sums Received in Payment of Minerals Extracted from the Mining Property.

The statute provides there shall be allowed as deduction "in the case of mines, oil and gas wells, * * * a reasonable allowance for depletion * * * according to the peculiar conditions in each case."

This Court, in the case of *Herring* v. *Commissioner of Internal Revenue*, 293 U. S. 322, held, under a similar provision of the Revenue Act of 1926, that deduction of the statutory percentage allowance for depletion of "oil and gas wells" may be made from advance royalty or bonus received upon the execution of an oil and gas lease, notwithstanding there was no well or production of oil or gas during the taxable year.

The Circuit Court of Appeals has decided this case on a narrow construction of the word "mines," holding that the allowance for depletion cannot apply to income received for minerals recovered from mine tailings or ore-bearing rock deposited on the land from prior underground mining operations, on the theory that such artificially deposited rock or tailings do not constitute a "mine" within the meaning of the statute.

The broad principle deducible from the *Herring* case, *supra,* is that the depletion allowance should apply to all payments received for extraction of mineral values in the land, regardless of whether the payment is made in advance or otherwise, and further regardless of the existence of a well or mine. The question presented is not whether the word "mines" means a hole in the ground as this Court has already held the language of the statute "in the case of oil and gas wells" does not mean that such a well must exist. Had this Court decided the *Herring* case, *supra,* on the narrow construction theory adopted by the Circuit Court of Appeals in this case, a different conclusion would have been reached, because no oil well existed during the taxable year. In this case a mine did exist on the property and the income of petitioner was received from extracting mineral values which had come from that mine.

The holding of the Circuit Court of Appeals is in conflict with the decision of this Court in the *Herring* case, *supra,* because the income of petitioner was received from extracting mineral values from the property, the mine tailings constituting a part of the mining property.

The mine was not cut out or abandoned because underground mining operations were carried on almost continuously since petitioner acquired its lease (R. p. 28). The remilling operations of petitioner consisted of cracking or breaking the small particles of rock in order to free the zinc ore which was then captured by means of gravity concentration and flotation. The ore resulting from this operation was primary ore (R. p. 27).

When the mine dirt was originally brought to the surface it was not a merchantable product until the dirt had been milled and the ore separated from the rock (R. p. 28).

The ore in the tailings (which were a part of the mining property) were mineral reserves just the same as the ore in the rock underground. Both were a part of the same property. The law bases the allowance at 15 per cent of the income derived from the property. The Regulations of the Treasury Department promulgated under the Revenue Act of 1932 (Regulations 77) take into consideration and provide for crushing and concentrating lead and zinc ores to put the concentrates so recovered in marketable form in determining the "gross income from the property." Article 221, Regulations 77.

The allowance is granted to compensate for the exhaustion of the mineral values contained in the property. *United States* v. *Ludey*, 274 U. S. 295. It is not the oil well or mine that is depleted—it is the mineral in the ground. The receipt of income from the sale of mineral values is made the generating cause of the depletion allowance and not the existence of a well or production from it. The mine tailings continued to be a party of the mining property.

Steinfeld v. *Omega Copper Co.*, 16 Ariz. 230, 141 Pac. 847.
Manson v. *Dayton*, 153 Fed. 258.
Ritter v. *Lynch*, 123 Fed. 930.

This Court has several times held that the allowance for depletion may be applied against a bonus received for an oil or gas lease (payments for extracting mineral values).

Herring v. *Commissioner of Internal Revenue*, 293 U. S. 322.
Burnet v. *Harmel*, 287 U. S. 103.
Murphy Oil Co. v. *Burnet*, 287 U. S. 299.
Bankers Pocahontas Coal Co. v. *Burnet*, 287 U. S. 308.
See also *Anderson* v. *Helvering*, 310 U. S. 404.

The mine tailings contained zinc values, the fine grains of zinc sulphide being embedded in the rock (R. p. 25). This means, of course, they were combined in the same way nature associated them. The process of extracting the mineral values contained in the mine tailings was a continuation of the mining process.

Waskey v. *McNaught*, 163 Fed. 929.
Noble v. Gustafson, 204 Fed. 69.
United States v. *United Verde Copper Co.*, 8 Ariz. 186, 71 Pac. 954.

If the statute which provides for a depletion allowance "in the case of oil wells" applies to an advance royalty or bonus for the lease, even though there has been no drilling of oil or gas wells on the property, then a like statute which provides for a depletion allowance "in the case of mines" should apply to income derived from the extraction of ore from tailings which came out of the ground and were a part of the mining property at the time the lease was made. In the latter case the income literally comes from the property.

A statute should not be given one construction when applied to "oil wells" and an entirely different construction when applied to "mines."

The ore produced by petitioner was additional to that produced by the former lessee, and having been made from rock taken from the mine, it was additional ore recovered from the property. If depletion is allowed as to ore made from the mine dirt and disallowed as to ore made from mine tailings (both the mine dirt and tailings originating from the same source), then we would have the anomalous situation of applying the statute to only a specified part of the income arising from the property as a whole.

If we are correct in interpreting the *Herring* case, then the decision of the Circuit Court of Appeals is in conflict with that case, because the income of petitioner was received as payment for mineral values extracted from the property.

Petitioner by Virtue of Its Lease Contract Had an Economic Interest in the Property Sufficient in All Respects to Entitle It to the Depletion Allowance.

The Circuit Court of Appeals holds that petitioner owns no economic interest in the mine from which the minerals were severed, notwithstanding its lease conferred upon it the exclusive possession of the deposits, full control over the production, right of ingress and egress for the purposes contemplated in the lease and the right to place such machinery and equipment on the premises as may be necessary (R. pp. 33-38). The rights granted to petitioner by its lease contract, created a very real and substantial interest in the property.

Lynch v. Alworth-Stephens Co., 267 U. S. 364.
Von Baumbach v. *Sargent Land Co.*, 242 U. S. 503.
United States v. *Biwabik Mining Co.*, 247 U. S. 116.

The facts here are to be distinguished from the case of *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, where it was pointed out that the respondent had no interest in the production nor any control over the means or methods of production, its only right being to receive the gas after it was produced. In the instant case petitioner had exclusive possession of the premises and full control over the production which gave to it enforceable rights with respect to the property.

The allowance for depletion is not made dependent upon the particular legal form of the taxpayer's interest in the property. It is enough if the taxpayer has such an interest in the property as to entitle him to share in the mineral production.

Palmer v. *Bender*, 287 U. S. 551.
Thomas v. *Perkins*, 301 U. S. 655.
Anderson v. *Helvering*, 310 U. S. 404.

The statute applies to everyone whose property right and interest therein has been depleted. *Lynch* v. *Alworth-Stephens Co., supra.*

The opinion of the Circuit Court of Appeals is thus in conflict with the decisions of this Court on this point. Petitioner shared in the mineral produced. It controlled the production and its capital investment was depleted by the removal of the ores. The fact that petitioner had no lease at the time the tailings were originally severed from the underground is rather beside the point when it is considered that the tailings were a part of the mining property at the time petitioner acquired its lease and engaged in the production of zinc concentrates, and that it was this production that caused the depletion. The property was not depleted until the ore reserves were removed, whether the rock containing the ore was on top of the ground or underneath. Under the facts and the decisions of this Court petitioner had a very real and substantial interest in the ores which were being exhausted by production.

Conclusion.

A decision in this case based on a narrow construction in defining the word "mines," would ignore other pertinent provisions of the statute, as well as its purpose. The ore in the tailings (which were a part of the mining property) were depletable reserves just the same as the ore in the underground rock. The law bases the allowance at 15 percent of the income derived from the property. The phrase "in the case of mines," coupled with the phrase "15 per centum * * * of the gross income from the property," means, of course, the whole process of extracting values from the land. The Regulations of the Treasury Department promulgated under the Revenue Act of 1932 (Regulations 77), take into consideration and provide for crushing and concentrating lead and zinc ores to put the same in marketable form in determining the "gross income from the property." Article 221, Regulations 77. The digging, removing and milling of the tailings was but a continuation of the process of extracting mineral values from the land in which petitioner held, by virtue of its lease, a very real interest suffi-

cient to entitle it to the depletion allowance. It is submitted that the judgment of the Circuit Court of Appeals is out of harmony with the opinions of this Court in the respects above set out, and that the Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX.

Revenue Act of 1932, c. 209, 47 Stat. 169:

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

* * * * * * * * * * *

"(l) DEPLETION.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance under this subsection for subsequent taxable years shall be based upon such revised estimate. In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each. (For percentage depletion, see section 114(b)(3) and (4).)

"(m) BASIS FOR DEPRECIATION AND DEPLETION.—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

* * * * * * * * * * *

"SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * * * * * * * *

"(4) PERCENTAGE DEPLETION FOR COAL AND METAL MINES AND SULPHUR.—The allowance for depletion shall be, in the case of coal mines, 5 per centum; in the case of metal mines, 15 per centum, and, in the case of sulphur mines or de-

posits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance for the taxable year 1932 or 1933 be less than it would be if computed without reference to this paragraph. A taxpayer making return for the taxable year 1933 shall state in such return, as to each property (or, if he first makes return in respect of a property for any taxable year after the taxable year 1933, then in such first return), whether he elects to have the depletion allowance for such property for succeeding taxable years computed with or without reference to percentage depletion. The depletion allowance in respect of such property for all succeeding taxable years shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return the depletion allowance for such property for succeeding taxable years shall be computed without reference to percentage depletion. * * * "

TREASURY REGULATIONS 77.

Promulgated Under the Revenue Act of 1932.

"ART. 221. *Depletion of mines, oil and gas wells, other natural deposits, and timber; depreciation of improvements.*—Section 23(l) provides that there shall be allowed as a deduction in computing net income in the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements. Section 114 prescribes the bases upon which depreciation and depletion are to be allowed.

"Under this provision of the Act the owner of an interest in mineral deposits, mineral properties, or timber, whether freehold or leasehold, is allowed annual depletion and depreciation deductions which, in the aggregate, will return to him the cost or other basis of such property as provided in section 113, plus, in either case, subsequent allowable capital additions (see articles 235 and 236) with the following exceptions and qualifications:

"(1) In the case of coal mines, metal mines, sulphur mines or deposits, and oil and gas wells the aggregate annual allowable deductions may, because of percentage depletion, ultimately exceed the cost or other basis:

"(2) In the case of coal mines, metal mines and sulphur mines or deposits the aggregate annual allowable deductions may never be as great as the cost or other basis, if an election of the percentage depletion method is made in the return for 1933; * * *

* * * * * * * * * * *

"When used in these articles (221-248) covering depletion and depreciation—

* * * * * * * * * * *

"(g) 'Gross income from the property' as used in section 114(b)(3) and (4) and articles 221 to 248, inclusive, means the amount for which the taxpayer sells (a) the crude mineral product of the property or (b) the product derived therefrom, not to exceed in the case of (a) the representative market or field price (as of the date of sale) of crude mineral product of like kind and grade before transportation from the immediate vicinity of the mine or well, or in the case of (b) the representative market or field price (as of the date of sale) of a product of the kind and grade from which the product sold was derived, before the application of any processes (to which the crude mineral product may have been subjected after emerging from the mine or well) with the exception of those listed below, and before transportation from the place where the last of the processes listed below was applied. Where there is no such representative market or field price (as of the date of sale), then there shall be used in lieu thereof the representative market or field price of the first marketable product resulting from any process or processes minus the cost (including transportation costs) of the processes not listed below. The processes excepted are as follows:

* * * * * * * * * * *

"(4) In the case of lead, zinc, copper, gold, or silver ores and ores which are not customarily sold in the form of the crude mineral product—crushing, concentrating (by gravity or flotation), and other processes to the extent to which they do not beneficiate the product in greater degree (in relation to the crude mineral product on the one hand and the refined product on the other) than crushing and concentrating (by gravity or flotation).

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 653

ATLAS MILLING COMPANY, A CORPORATION,
PETITIONER

v.

HENRY C. JONES, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 42–49) is reported in 29 F. Supp. 942. The opinions of the Circuit Court of Appeals (R. 53–56, 58–60) are reported in 115 F. (2d) 61.

JURISDICTION

The original judgment of the Circuit Court of Appeals was entered on June 5, 1940 (R. 56), and the judgment after rehearing was entered on October 14, 1940 (R. 60). The petition for a writ of certiorari was filed on December 26, 1940.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a milling corporation, engaged in recovering minerals from residue deposited on the surface above a mine in prior years, is entitled to a percentage depletion allowance under Section 23 (l) and (m) and Section 114 (b) (4) of the Revenue Act of 1932.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations involved are printed in the Appendix to the petition, pp. 17–19.

STATEMENT

Petitioner is a corporation engaged in milling operations in the State of Oklahoma. (R. 16.) In 1933, it entered into tailing or milling agreements giving it the exclusive right to recover lead and zinc ores from "tailings, sludge, slime, chats, and sands" which had theretofore been dumped on certain property during mining operations. (R. 33–41, 49.) Petitioner agreed to pay "as its rent or royalty" specified percentages of its receipts from sales of recovered minerals. (R. 35, 40.) During 1933 petitioner received gross receipts of $43,579.84 from sales of recovered minerals. Rents or royalties amounting to $10,782.18 were paid, leaving net receipts of $32,797.66. In

its tax return petitioner claimed a depletion allowance of fifteen per cent of this sum, under Section 114 (b) (4) of the Revenue Act of 1932. The Commissioner took the position that petitioner was not entitled to percentage depletion, and limited petitioner's allowance for depletion to an amortization of the cost to petitioner of the tailing agreements. (R. 17–18.) Petitioner paid the tax as so computed, and sued for refund. (R. 54.) The District Court gave judgment for the Collector (R. 50), and the Circuit Court of Appeals affirmed (R. 56, 60).

ARGUMENT

The Commissioner has permitted petitioner an allowance for depletion computed in the ordinary way, by amortization of the cost to petitioner of the tailing agreements, and also a deduction for depreciation on petitioner's mill and equipment. (R. 17–18.) By this method petitioner will receive the return of its entire capital investment. Petitioner's contention is that it is entitled to percentage depletion under Section 23 (l) and (m) and Section 114 (b) (4) of the Revenue Act of 1932. It is, however, well settled that percentage depletion is available only to those having a capital investment in minerals "in place". *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 367. Petitioner has no such investment: it is but a processor, like the taxpayer in the *Bankline* case. (Cf. R. 30.) Under its agreements petitioner had no

right to extract ore from the mine, but only to treat and recover minerals from the tailings on the surface.

Petitioner cites *Herring* v. *Commissioner,* 293 U. S. 322, as in conflict with the decision below. There this Court held that the lessor might take a percentage depletion allowance against advance royalties and bonuses received under an oil and gas lease, even though there was no production on the property during the year. Clearly the payments in that case were made for the right to extract oil in place; the question was only whether the fact that the right had not yet been exercised precluded a depletion allowance.

In all the other cases involving depletion allowances cited by petitioner the taxpayers' interest attached before the oil or mineral yielding the income had been extracted or removed from the well or mine.[1] Therefore, those decisions do not conflict with the holding below.

Petitioner urges that mine tailings continue to be a part of a mining property, citing *Manson* v. *Dayton,* 153 Fed. 258 (C. C. A. 8th); *Ritter* v. *Lynch,* 123 Fed. 930 (C. C. D. Nev.); *Steinfeld* v. *Omega Copper Co.,* 16 Ariz. 230, 141 Pac. 847.

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[1] *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364; *Burnet* v. *Harmel*, 287 U. S. 103; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299; *Bankers Coal Co.* v. *Burnet*, 287 U. S. 308; *Palmer* v. *Bender*, 287 U. S. 551; *Thomas* v. *Perkins*, 301 U. S. 655; *Anderson* v. *Helvering*, 310 U. S. 404.

But this does not mean that tailings are minerals "in place" within the revenue act.

Petitioner also cites cases in support of the proposition that the extraction of ores from tailings is a continuation of the mining process. *Noble* v. *Gustafson*, 204 Fed. 69 (C. C. A. 9th); *Waskey* v. *M'Naught*, 163 Fed. 929 (C. C. A. 9th); *United States* v. *United Verde etc. Co.*, 8 Ariz. 186, 71 Pac. 954. In all of those cases the processing was being done as part of the original mining process, and such cases would in any event be of little relevance in the construction of federal tax statutes.

CONCLUSION

There is no conflict and no question of general importance is presented; therefore the petition should be denied.

Respectfully submitted.

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JANUARY, 1941.

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